

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DAVID THOMAS, JR. §  
v. § CIVIL ACTION NO. 07-3251  
§  
HOUSTON POLICE OFFICERS §  
C. ZAKHORIA, C. ROZEK, J. CHASE, §  
DANIEL GARZA and JOHN DOE §  
OFFICERS 1-3, HOUSTON POLICE § JURY TRIAL DEMANDED  
OFFICERS in their individual and §  
supervisory capacities §

**DEFENDANTS' MOTION FOR RECONSIDERATION and FURTHER RULING**

TO THE HONORABLE GRAY H. MILLER:

COMES NOW Defendants in the captioned litigation, and files this, their Motion for Reconsideration and Further Ruling on the previously filed Motion for Summary Judgment, [Doc. 35], and would show the Court as follows:

**A. Procedural History**

- i. This is a lawsuit brought pursuant to 42 USC § 1983 for injuries and damages claimed by the Plaintiff as the result of the alleged use of excessive force by Defendant HPD officers during an arrest for possession of a controlled substance with intent to deliver. Plaintiff's pleading also alleges the City is liable to him, for failure to adequately investigate the incident thereby causing the use of excessive force to "proliferate;" that the City does not train, discipline or retrain its officers; and that the City has customs, practices, procedures or policies that caused his injuries. Plaintiff further alleges state tort causes of action against the City and the officers of, assault, battery and intentional infliction of emotional distress. Plaintiff also alleges civil conspiracy.
- ii. On March 26, 2009, Defendants filed their Motion for Summary Judgment [Doc. 35].
- iii. On November 16, 2009, the Court issued an Order denying Defendants' Motion for Summary Judgment as to Plaintiff's excessive force claim and Defendants' qualified immunity defense [Doc. 49].

iv. Defendants' believe this case will be placed on the Court's January 2010 trial docket.

**B. Argument and Authority**

1. A motion for reconsideration is governed by Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) states that a motion to alter or amend a judgment must be filed no later than ten (10) days after the entry of judgment. The Court issued its Order denying the officers' motion for summary judgment on November 16, 2009. [Doc. 49]. Defendants' motion is timely filed.

2. In its Order, the Court addressed Plaintiff's allegation of excessive force and Defendants' defense of qualified immunity, and expressly denied Defendants' motion as to those issues. The excessive force allegations are against officers Zakharia, Rozek and Chapnick only.

3. The Court ruled expressly and exclusively on Plaintiff's claim of excessive force and defendants' defense of qualified immunity. In their motion, Defendants sought summary judgment on a number of issues which are elaborated on below. Defendants respectfully request the Court issue an order clarifying its ruling by making additional rulings as to the remainder of the issues presented in Defendants' motion. Defendants would suggest that it would be in the interest of judicial economy to narrow the issues as much as possible prior to trial, and that a ruling on the outstanding summary judgment issues would accomplish such a narrowing.

4. Defendants Chase and Garza sought dismissal of Plaintiff's claims against them, as they were not at the scene when the alleged actions giving rise to this litigation

occurred.<sup>1</sup> Defendants respectfully request a reconsideration by the Court and a ruling on the issue of whether these two officers should be dismissed from the lawsuit.

5. The City sought summary judgment on the grounds that Plaintiff failed to produce any evidence of a custom or policy<sup>2</sup> on the part of the City which would have encouraged or validated the officers' actions, if Plaintiff's allegations are taken as true.<sup>3</sup> Defendants respectfully request the Court revisit their motion and issue a ruling on the issue of the City's § 1983 liability in this matter.

6. Plaintiff claimed conspiracy against the officers involved in this matter. In their motion, Defendant officers sought summary judgment on the issue of conspiracy, as the Plaintiff has provided no evidence of same. Accordingly, Defendants respectfully request a reconsideration by the Court and a ruling on the issue of a conspiracy among the officers against Plaintiff.

7. Finally, Plaintiff alleged several state law claims against the Defendants, pursuant to the provisions of the Texas Tort Claims Act.<sup>4</sup> Under the provisions of the Act, as well as Article IX, § 11 of the City's Charter<sup>5</sup>, Plaintiff wholly failed to give proper notice of a claim against the City. Thus, Defendants request a ruling by the Court regarding the state law tort claims Plaintiff has made against the City of Houston and the officers involved in the incident giving rise to this lawsuit.

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<sup>1</sup> See § C, ¶¶16-18

<sup>2</sup> See, *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 694 (1978)

<sup>3</sup> §E, ¶¶ 19-25

<sup>4</sup> § 101.001, *et seq.*, Texas Civil Practice and Remedies Code

<sup>5</sup> See Exhibit "J" to Defendants' Motion for Summary Judgment

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that this Honorable Court reconsider Defendants' motion and make further rulings on same, to encompass the outstanding issues presented by the motion.

Respectfully submitted,

By /S/ L.A. Teehan

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J.R. CHASE, D. GARZA, C. ROZEK and  
M. CHAPMAN

OF COUNSEL:

City of Houston Legal Department  
ARTURO MICHEL  
City Attorney

**CERTIFICATE OF CONFERENCE**

Plaintiff's counsel has communicated his opposition to this motion to counsel for Defendants.

/S/ L.A. Teehan  
L.A. TEEHAN

**CERTIFICATE OF SERVICE**

I, L.A. Teehan, hereby certify that on the 25<sup>TH</sup> day of November, 2009, a copy of the foregoing **Defendants' Motion for Reconsideration** was filed and served upon the following attorney of record:

Randall L. Kallinen  
Attorney at Law  
511 Broadway Street  
Houston, Texas 77012  
**Via USDC e-file system**

/S/ L.A. Teehan

L.A. TEEHAN